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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959.

No. 517

QUALITY COAL CORPORATION
AN INDIANA CORPORATION,
Petitioner.

vs.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS BELOW.

The opinion of the District Court has not been reported. It is set forth at pp. 240, 241 of Appendix of Record accompanying and printed together with petitioner's origi-

nal brief filed in the Court of Appeals. (Said Appendix is hereinafter referred to as "Record".)

The opinion of the Circuit Court of Appeals for the Seventh Circuit has been reported at 270 Fed. 2d 140. A copy is appended as Appendix I. The dissenting opinion is appended as Appendix IA.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 18, 1959. (*Infra*, Appendix II.) A Petition for Rehearing was denied on September 24, 1959 with Circuit Judge Schnackenberg voting to grant a rehearing. (*Infra*, III.) A Stay of Mandate pending disposition by said Court was granted extending the time to November 13, 1959. (Appendix IV.) The jurisdiction of this Court is invoked under provisions of 28 U. S. C. A., Section 1254(1).

Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U. S. C. A. 1291.

QUESTIONS PRESENTED.

Petitioner, in the trial court, filed a Motion to Dismiss and for judgment on the pleadings, it was later titled Motion for Summary Judgment. (Record page, 205.) The aforesaid Motion is as follows:

> "Defendants respectfully pray this Honorable Court that the complaint in the above case be dismissed and the judgment on the pleadings herein be entered for the defendants on the grounds that:
>
> "1. The complaint fails to state a legal claim against defendant upon which relief can be granted.
>
> "2. The plaintiffs lack the capacity to sue in the above cause.
>
> "3. That the United Mine Workers of America are indispensable parties to this action.
>
> "4. That plaintiffs are not the real or proper parties in interest."

In view of this Motion several propositions under the law and facts were submitted to the trial Court, and Petitioner's Motion was overruled. These propositions are:

1. Was a trust ever created?

A. Since no money had ever been transferred, nor delivered to the alleged fund, then no trust was created and plaintiffs could not sue as trustees of a trust that was not in existence for a corpus that might accrue in the future.

2. The Agreement was void because of a closed shop provision in the contract which was in violation of the Taft-Hartley Act.

A. The Agreement, among other things, provided: "• • • as a condition of employment, all employees shall be, or become members • • • to the extent and in the manner permitted by law • • •"

Admitted facts in the record show that in the operation under the Agreement at petitioner's mine, a closed shop was forced on them. (Record pp. 100-107.) Respondents attempted to negative this evidence. (Record pp. 159-164.) Petitioner sustained the violation of the Taft-Hartley Act. (Record pp. 193-198.)

3. The contract was void because it was made under duress.

A. Admitted facts sustained this contention. (Record pp. 101-105, Record pp. 193-198.)

4. The contract was unilateral and void.

A. Petitioner was the only signatory bound by the Agreement. Respondents were not signatories.

5. Indispensable parties were lacking.

A. The United Mine Workers of America did not sign the Agreement and were the only parties who could declare a violation of said agreement.

6. There was a dispute as to a genuine issue on material facts, and the judgment is contrary to law.

A. The evidence is replete to sustain petitioner. (Record pp. 101-105, Record pp. 159-164, Record pp. 193-198.)

STATUTES INVOLVED.

The pertinent statutory provisions are printed in appendix V, pages 33, 34 and are as follows to-wit:

29 U. S. C. A. 158, 8(A)(1), 8(A)(2), 8(A)(3).
29 U. S. C. A. 158, 8(B)(1), 8(B)(2).
29 U. S. C. A. 157.

STATEMENT OF THE CASE.

Respondents, as trustees of the United Mine Workers of America Welfare and Pension Fund, filed suit for $84,176.40 by reason of an agreement wherein petitioner allegedly agreed to pay 40¢ a ton on all coal produced for a period of two years.

The petitioner filed affirmative defenses, (Record pp. 40-47), respondents filed motion for a summary judgment (Record pp. 56, 57), and the petitioner filed a cross motion for summary judgment seeking an adjudication because respondents did not have a legal claim for the reason that unfair labor practices had been committed by the United Mine Workers of America in violation of 29 U. S. C. A. 158 (A)(1), (A)(2), (A)(3), (B)(1), and (B)(2), and for the further reason that a closed shop was forced upon the petitioner against his will and for the further reason that indispensable parties were lacking. The District

Court overruled petitioner's motion for summary judgment and granted respondents' motion for summary judgment by adopting its memorandum opinion filed by them, which is set out at Record pp. 240, 241.

Petitioner appealed to the Court of Appeals. The Court of Appeals, by a two to one decision, affirmed the judgment of the District Court. Petitioner's petition for rehearing was likewise denied by a two to one decision.

Adjudication of the issues by the pleadings and affidavits, which are admitted facts, and other material in the case, sustained the petitioner's contentions that the statutes were violated by reason of the agreements sued on.

Section 158 (A)(3) forbids a closed shop agreement and the agreements upon which suit was brought conclusively shows that it was a prerequisite and mandatory that all employees "shall be, or become members * * *". The admitted facts in the record conclusively show that in the operation under the agreement at petitioner's mines, a closed shop was forced upon the operators by compelling non-union employees to join the union by the morning of the third day or get fired, and not giving them the 30 day grace period following the beginning of their employment as required by the Taft-Hartley Act.

Since the contract was null and void under the Taft-Hartley Act by virtue of the closed shop being forced upon petitioner, the pseudo defense that the "savings clause" legalized the contract does not merit consideration for the reason that the contract was an integrated instrument and its respective provisions were interdependent upon one another and the contract had to be considered as a whole, and since one part was illegal, then the entire agreement was a nullity.

BASIS FOR FEDERAL JURISDICTION IN TRIAL COURT.

The respondents, trustees of said fund, maintained their residence and place of business at 907 Fifteenth Street, N. W., in Washington, of the District of Columbia. Trustee John L. Lewis is a citizen of the State of Illinois. Trustee Henry G. Schmidt is a citizen of the State of Ohio. Trustee Josephine Roche is a citizen of the State of Colorado. The petitioner, Quality Coal Corporation, a corporation, was organized and exists under the laws of the State of Indiana, located in Clay County in the State of Indiana. Due to the diversity of citizenship of the litigants, and the fact that the amount in controversy exceeded $3000.00, the United States District Court for the Southern District of Indiana, Terre Haute Division, had jurisdiction.

REASONS RELIED ON FOR GRANTING WRIT.

I. The Agreement Was Illegal by Virtue of Petitioner Being Forced to Operate a Closed Shop.

(A) The Majority Opinion Is at War with General Principles of Established Law.

This case raises important questions of Federal Law wherein various Circuit Courts of Appeal are in irreconcilable conflict with one another and therefore should be settled by this Court. The conflict existing between the several Federal Circuits fully appears to be one of fact as well as principle of law. We preface our reasons why certiorari should be granted by stating that there isn't any question but what the agreement was unlawful and that the defense of violation of the Taft-Hartley Act has been conclusively shown. Certiorari should further be granted so that for once and for all, there shall be a unity among the various circuits in determining similar questions and ap-

plying a rule of law that will be binding on all sections of the country.

We cannot overlook the comment made by Circuit Judge Schnackenberg in the dissenting opinion in which the Court of Appeals for the Seventh Circuit affirmed this cause of action. His statement at page 8 was, "As far as this case is concerned, by judicial decision, a part of a federal act has in effect been repealed. The act was not saved; a contractual provision in violation of the act is saved."

In *Standard* v. *Olsen* (1954), 75 Sup. Ct. 768, 771, the Court said: "It is for Congress, not the Courts, to write the law."

Facts in the Record.

The admitted and undisputed facts in the record conclusively show that in the operation under the agreement at petitioner's mines, a closed shop was forced upon the operator. The evidence is replete that an employee who is not a member of the Union, when hired, has until the morning of the third day to belong to the Union or quit or get fired. He is deprived of the 30-day grace period, under Section 8(A)(3) of the Act; that if said non-union employee refused to join the Union on the morning of the third day, then the Union's employees would refuse to work by virtue of instructions of the District Union whose Article 9, Section 2 of the Constitution of the U. M. W. of A., is:

> "That all members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the Union." (Record p. 100.)

This is further sustained by other evidence of three other individuals which is not disputed, at Record pp. 105, 106 and 107.

(B) The Reasoning of the Majority Opinion Is Inconsistent with General Principles of Law.

The majority opinion holding that 29 U. S. C. A., Section 158(A)(3) was not violated is in direct conflict with *N. L. R. B.* v. *Gottfried Baking Co.*, 2d Circuit 1954, 210 Fed. (772), which, among other things held:

> "The preferential hiring clause • • • was clearly illegal as it excludes new applicants at the threshold if they are not members • • •, and deprives them of the 30-day grace period • • • We think that the mere execution of a contract containing such a provision, even apart from its actual enforcement, constitutes 'discrimination in regard to hire' on the part of an employer and falls squarely within the prohibition of Section 8(A)(3) for as this Court, in so holding, stated in *Red Star Express Lines* v. *N. L. R. B.* (1958), 196 Fed. 2d 78, 81: 'The existence of such agreement without more tends to encourage membership in a labor organization • • •.'"

This Court further stated:

> "Since the Union joined in the execution of the contracts contained these illegal provisions and assisted in enforcing them, it follows that the Union 'cause (d) • • • an employer to discriminate against an employee in violation of Section 8(A)(3)' thus violating Section 8(B)(2)."

The majority opinion is in irreconcilable conflict with the Ninth Circuit (1953). The Ninth Circuit in *N. L. R. B.* v. *United Brotherhood C. & J.* (1953) (9th), 202 Fed. (2d) 516, 518, held:

> "An agreement with Employer that only those employees who belonged to Union, or who were referred by that Union, would be hired by the employer, which agreement was of sufficient potency to cause the employer to refuse to hire in violation of the Agreement for fear the Union would be 'on its neck,' was guilty

of unfair labor practices under both Section 8(B)(1)(A) and Section 8(B)(2) of the Taft-Hartley Act."

The majority opinion likewise is in square conflict with the Circuit (1953). In *N. L. R. B.* v. *McGraw and Company* (1953), 206 Fed. (2) 635, 639, the Court ruled:

> "That Section 8(B)(1)(A) and Section 8(B)(2) are violated by a Union if it enters into, maintains or causes the enforcement of a closed shop agreement with an employer, or if it arranges with the employer that Union employees will be given priority * * *".
>
> "A Union which executed with an employer an alleged security contract which threatened employees with loss of their jobs if they did not become members of the Union violated Section 8(B)(1)(A). *Re Bowen* 93 NLRB 1147."

The majority opinion likewise conflicts with the Tenth Circuit in *N. L. R. B.* v. *Broderick Wood Products Co.*, 10th Circuit (1958), 261 Fed. 2d 548. The *Broderick* case, at p. 555, under the Union Security clause in the last sentence thereof, read:

> "Preference shall be given, in hiring new employees to members of the Union who are capable, in the opinion of the Employer, to perform the work in the Employer's plant."

The Court held, at p. 556:

> "It is settled law that the mere execution of an illegal security clause without more is a violation of the Act * * *"

The majority opinion is again in conflict with the Ninth Circuit. In *N. L. R. B.* v. *E. F. Shuck Construction Co.*, 9 Cir., 243 F. 2d 519, at p. 521, the Court stated, concerning another illegal union-security clause:

> "The mere retention of such a clause in a contract in force between the parties is a continuing unfair labor practice even where there is no attempt to enforce it,

> because so long as it remains a part of the contract it 'tends to encourage membership in a labor organization' in violation of Section 8(a)(3)."

Petitioner submits that if the 30 day period was omitted from the agreement, the Act mandates that the employee shall have 30 days grace to join the Union. It was held in *N. L. R. B.* v. *United Elect. R. & M. Wkrs.*, 203 Fed. (2) 673, 676, that the minimum joining period of 30 days must be read into every agreement.

(C) Majority Opinion Nullifies 29 U. S. C. A. 157 and U. S. C. A. 158 (B) (1) (B) (2).

The Opinion at page 5 among other things states:

> "The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice under 29 USCA, Sec. 158(A)(3)."

This in effect nullifies Sec. 157 and approves the Union's action in forcing non-union employees to join in violation of Sec. 8(B)(1) and 8(B)(2).

The Court continued:

> "At most, such conduct or practice not authorized by the argument itself would show that the Union and Quality violated applicable law. It would not alter or change the terms of the agreement."

Assuming the agreement did not authorize such conduct the sections of the above acts prohibited such conduct. This decision indirectly repealed these laws.

The fact that petitioner complied with the demand to hire only Union men or impliedly compelled them to join the Union on the third day, did not exonerate the Union from violating Sec. 8(B)(1)(A) and (B)(2). *Brown* v *National Union* (1951), 104 Fed. Supp. 685, *N. L. R. B.* v.

McGraw, 206 Fed. 2d 635. (Quoted at page 9 of this petition.)

Forcing non-union employees to join the Union on the morning of the third day not only violated Section 8(A)(3) but violated 29 USCA, Section 157.

II. The Majority Opinion That the "Savings Clause" Legalized the Contract Is in Conflict with General Principles of Law.

The majority opinion admits the Agreement violates Section 158.(a)(3) if it were not for the so-called "savings clause" which is, "to the extent and in the manner permitted by law * * *" It justifies its decision upon *Lewis v. Fentress*, 264 Fed. 2d 134, which involves none of the questions which were decided by the majority opinion. The *Fentress* decision was made on matters completely outside of the issues involved in this cause and completely ignored the undisputed facts in the record. Primarily, it was made on the proposition that there was no alteration or change in the terms of the contract and brushed off the important matter as to whether or not there was a violation of a closed shop. The majority opinion and the *Fentress* case are in direct conflict with the majority of the circuits. Similar alleged "savings clauses" were held to be of no effect in *NLRB v. Gaynor News Co.* (2nd Cir.), 197 Fed. (2) 719, 723; *NLRB v. Shuck Constr. Co.* (9th Cir.), 243 Fed. (2) 519, 521; *NLRB v. Gottfried Baking Co.* (2nd Cir.), 210 Fed. (2) 772; and *Red Star Express Lines v. NLRB*, 196 Fed. (2) 78, 81. As stated in the dissenting opinion the *Gaynor* case was affirmed by the Supreme Court on February 1, 1954.

III. The Agreement Was an Integrated Instrument and Any Illegal Provision Therein Destroyed the Entire Agreement.

The "savings clause" being a provision of the Agreement and since the respective provisions were interdependent on one another, the Agreement had to be considered in its entirety. Therefore, the illegal provision destroyed the entire Agreement. (*Lewis et al. v. Benedict Coal Corp.* (1958), 259 Fed. 2d 346, 354.)

It was likewise held in *NLRB* v. *Broderick Wood Product Co., et al.* (1985), 261 Fed. 2d 548, 555, 556, 557 that the savings clause did not salvage or save the illegal clause in the contract. The Court stated, at p. 558:

> "The mere execution of a legal clause * * * is itself an unfair labor practice within the Act. The savings clause does not avoid that rule."

It can readily be seen that the mere retention and the mere execution of such clauses is a violation without proof of the act showing the violation.

The Second Circuit in *NLRB* v. *Gottfried Baking Co.*, 210 Fed. (2) 772 at 780 stated:

> "Nor is it of consequence, as the respondents contend, that each of the contracts contained a 'savings clause' the intended effect of which was to salvage as much union security as possible should the preferential hiring provisions be invalidated. The inclusion of this vague 'savings clause' in each contract does not purge the preferential hiring provisions of their illegal effect."

The majority opinion (p. 4) commented:

> "The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract."

How can this be reconciled with the clause in the contract as follows, to-wit:—

> "This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950." (Record p. 61.)

This is in direct conflict with *Lewis et al. v. Benedict Coal Corp.* (1958), 261 Fed. 2d 548, 555, 556, 557, and others.

IV. The Contract Was Void Because it Was Made Under Duress.

The majority opinion states that there is no merit to petitioner's claim that the Agreement was invalid because of duress: It states:—

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress and mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract."

This statement is quoted from *Birmingham v. Bartels*, 157 Fed. 2d 295. The majority opinion no doubt, in quoting from the *Birmingham* case, overlooked part of the *Birmingham* opinion in this, to-wit:—

> "A Court of law cannot acknowledge a contract because of alleged unfairness in the negotiation by which the obligation has been created, *unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them attempted to be proved.*" (Our emphasis.)

Numerous undisputed affidavits are in the record showing that duress was perpetrated on this operator. (Record pp. 101-105; Record pp. 193-198.) The *Birmingham* case with the omission considered over rules the majority opin-

ion. In the case at Bar the evidence was replete that the operator was coerced in executing the Agreement, and the evidence sustained the affirmative defenses.

V. The Contract Was Unilateral and Void.

Since the contracting parties were the United Mine Workers of America and the petitioner Quality Coal Corporation, and the action was brought by a non-signatory to the Agreement, and only the petitioner is bound by the Agreement and no obligation is placed upon the respondents by virtue of the Agreement, then it results in a unilateral agreement wherein only petitioner is bound and there is a lack of mutuality of obligation which is an essential element in every enforceable agreement. (*Davis* v. *Davis*, 197 Ind. 386, 151 N. E. 134.)

VI. Indispensable Parties Were Lacking.

The majority opinion states that this proposition was answered in a former case involving the same litigants and reported in 243 Fed. 2d 770, 772. With deference to the majority opinion the *Lewis* case cited is of no bearing for the reason that there were no pleadings filed in the first *Quality* case which raised these issues. The *Carter* case pertained to the interpretation of the Miller Act and the contract therein provided:

> "The Trustees had sole power to demand and enforce prompt payment of employer contributions."

There was no such clause in the contracts involved in this litigation, and since the *Carter* case involved the interpretation of the Miller Act relative to construction work on Federal projects, the Court made its decisions on matters not in issue in this case. The *Embassy* case is not in point for the reason it is foreign to the issues at stake.

The majority opinion relative to indispensable parties is contrary to the 2nd Circuit, *Lewis et al. v. Benedict Coal Company*, 259 Fed. (2), 346, 354, which held the Union to be indispensable parties. It was said:

> "Hence we conclude that obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently the District Court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defense arising from breaches by the Union."

Since the Union was a signatory to the contract and they were the only ones who could declare at their option a violation of the Agreement (Record p. 127), and they did exercise this option on October 13, 1955 (Record p. 198), then it goes without saying that the Union was indispensable so that if there were any defenses by reason of illegal strikes, etc., they could have been raised as was done in the *Benedict* case herein cited.

VII. No Trust Was Created and Therefore the Plaintiffs Could Not Bring This Cause of Action.

Petitioner submits that there must be delivery of the corpus or there can be no trust.

At pages 2 and 3 of the majority opinion, the Court concluded that a trust was created. With deference to the majority opinion, we are unable to reconcile this rule in view of re-statement of trusts 1935, Section 76, which reads:

> "The subject matter of a trust must be definitely ascertainable from the facts existing at the time of the execution of the trust."

Likewise, a clause under said Section 76 provides:

> "A trust cannot be created if the thing which would

be the subject matter of the trust cannot be ascertained until a future time."

We respectfully submit that the holding in the majority opinion is in direct conflict with the established rule of law in the State of Indiana, that there can be no trust created without delivery. (*Kraus* v. *Kraus*, 235 2nd 325, 132 N. E., 2nd, 608.)

CONCLUSION.

Petitioner submits that the writ of certiorari should be granted because it is of great public importance for the following reasons:—

1. It is in conflict with the 2nd, 9th and 10th United States Courts of Appeal.

2. It is likewise in conflict with the United States Supreme Court.

3. The Agreement was in violation of Section 158 (a) (3).

4. The Union violated Section 158 (b) (1) and (b) (2).

5. The Union violated Section 157 in refusing employees rights under the act.

6. The undisputed facts in the record conclusively show that petitioner was forced to maintain a closed shop.

7. There was no separability clause as the contract was integrated and the provisions were interdependent upon one another and the illegality of a clause of the contract destroys the entire contract.

8. The evidence conclusively shows that a non-union employee had to join the Union by the morning of the third day or get fired and if such employee refused to join the Union, then the Union employees would refuse to work by virtue of the Union's by-laws. The 30 day grace period

under Section 8 (a) (3) was not complied with and was ignored.

9. The evidence is replete that the operator (petitioner) was forced, under duress, to execute the contracts.

10. No trust was ever created.

11. The United Mine Workers of America were necessary and indispensable parties to this lawsuit.

12. The contract was unilateral in that none other than the petitioner was compelled to perform any of the clauses of the contract.

13. The majority opinion is at war with general principles of law.

14. The reasoning of the majority opinion is inconsistent with general principles of law.

15. This Court should grant the writ of certiorari in order to resolve the matter in view of the inconsistency here and above enumerated and because of the divided opinion.

Respectfully submitted,

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